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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 44.

PETER NELSON AND HENRY NELSON, PLAINTIFFS IN ERROR,

v.

THE NORTHERN PACIFIC RAILWAY COMPANY.

BRIEF FOR DEFENDANT IN ERROR.

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Counsel.

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Supreme Court of the United States.

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No. 44.

PETER NELSON AND HENRY NELSON, PLAINTIFFS IN ERROR,

v.

THE NORTHERN PACIFIC RAILWAY COMPANY.

Argument for Defendant in Error.

STATEMENT.

This case is before the court on a writ of error to the supreme court of the State of Washington. The action was brought by The Northern Pacific Railway Company, defendant in error here, to recover possession of part of an odd-numbered section of land lying within the place or granted limits of the grant to the Northern Pacific Railroad Company by act of Congress of July 2, 1864 (13 Stat., 365).

The supreme court of Washington held, reversing the trial court, that the railway company was entitled to recover. The case was tried without a jury upon an agreed statement of facts, contained in the record (Trans., pp. 19–22), from which it appears as follows:

By section 3 of the Northern Pacific granting act it was provided:

"That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers not more than ten miles beyond the limits of said alternate sections."

By section 6 of this act it was provided:

"*And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of

the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twentieth, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre, when offered for sale."

The Northern Pacific Railroad Company fixed the general route of its road opposite the land in controversy and within forty miles thereof by filing a plat of such general route in the office of the Commissioner of the General Land Office on August 20, 1873 (Trans., p. 20); thereafter, and on November 1, 1873, the Commissioner of the General Land Office transmitted to the officers of the district land office for the district in which the land in question was situated a letter of instructions withdrawing the land from entry. This letter is as follows:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *November* 1, 1873.

"*Register and Receiver, Walla Walla, W. T.*

"GENTLEMEN: The Northern Pacific Railroad Company having filed in this Department a map showing the general route of their branch line from Puget sound to a connection with their main line near Lake Pend d'Oreille, in Idaho Territory, I have caused to be prepared a diagram, which is herewith transmitted, showing the forty-mile limits of the land grant along said line, extending through your district, and you are hereby directed to withhold from sale or entry all the odd-numbered sections falling within these limits not already included in the withdrawal for the main line. The even sections are increased in price to $2.50 per acre, subject

to pre-emption and homestead entry only. This withdrawal takes effect from August 15, 1873, the date when the map was filed by the company with the Secretary of the Interior, as required by the sixth section of the act of July 2nd, 1864, organizing said company.

"Be pleased to acknowledge the date of the receipt of this letter.

"Very respectfully,

"WILLIS DRUMMOND,
"*Commissioner.*"

(Trans., p. 21.)

The letter and the diagram there referred to were received at the district land office on November 17, 1873 (Trans., p. 21). The land in question was situated within the forty-mile limits of the land grant as designated on this diagram (Trans., p. 21). On December 8, 1884, the Northern Pacific Railroad Company fixed the line of definite location of its railroad opposite the land in controversy by filing a plat thereof, duly approved by the Secretary of the Interior, in the office of the Commissioner of the General Land Office (Trans., p. 21), and prior to November 18, 1886, the railroad company completed a section of forty miles of its line of railroad coincident with its line of definite location, opposite the land in question, and the road so constructed was duly accepted as provided in the act (Trans., p. 21). The line of definite location and construction was within forty miles of the land in question, and the land therefore fell within the place or granted limits (Trans., p. 21).

On May 10, 1895, the United States executed and delivered to the Northern Pacific Railroad Company its patent, whereby it conveyed the premises in controversy in

pursuance of the provisions of the granting act (Trans., p. 22).

Before the commencement of the action the Northern Pacific Railway Company succeeded to the title of the Northern Pacific Railroad Company in the premises (Trans., p. 19).

After the withdrawal on general route, and in the year 1881, Henry Nelson, one of the defendants below, went upon the lands in controversy, and has since resided thereon (Trans., p. 22). Nelson was then qualified to enter public lands under the homestead law of the United States (Trans., p. 22). The land was surveyed by the United States in 1893, and thereupon Henry Nelson made application to the district land officers to enter the land as a homestead under the laws of the United States, but his filing was rejected upon the ground that it conflicted with the Northern Pacific grant. The decision of the district land officers was affirmed by the Commissioner of the General Land Office (Trans., p. 22). It appears that Peter Nelson is occupying the premises under license from Henry Nelson (Trans., p. 22).

It was held by the supreme court of Washington that the Interior Department was right in rejecting the homestead application of Henry Nelson, for the reason that the land was not subject to entry when he made his settlement thereon or when he offered his filing.

ARGUMENT.

It is submitted that the decision of the supreme court of Washington is correct, both under the decisions of this court and under the settled construction of the Interior Department.

The State supreme court held that upon the fixing of the general route of the Northern Pacific railroad, in 1873, and the issuance of the order of withdrawal by the Commissioner of the General Land Office the land in question was no longer subject to homestead entry.

In *Buttz v. Northern Pacific Railroad Company*, 119 U. S., 55, it appeared that a pre-emption filing had been offered for lands within the place limits of the Northern Pacific grant after the map of general route had been filed and an order of withdrawal issued thereon and before the line was definitely fixed. This court said:

"The act of Congress not only contemplates the filing by the company, in the office of the Commissioner of the General Land Office, of a map showing the definite location of the line of its road, and limits the grant to such alternate odd sections as have not at that time been reserved, sold, granted or otherwise appropriated, and are free from pre-emption, grant, or other claims or rights, but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry or pre-emption of the adjoining odd sections within forty miles on each side until the definite location is made. The third (sixth) section declares that, after the general route shall be fixed, the President shall cause the lands to be surveyed for forty miles in width on both sides of the entire line as fast as may be required for the construction of the road, and that the odd

sections granted shall not be liable to sale, entry, or pre-emption, before or after they are surveyed, except by the company. * * * When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the Interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain: it is to preserve the land for the company to which, in aid of the construction of the road, it is granted. Although the act does not require the officers of the Land Department to give notice to the local land officers of the withdrawal of the odd sections from sale or pre-emption, it has been the practice of the Department in such cases to formally withdraw them. It cannot be otherwise than the exercise of a wise precaution by the Department to give such information to the local land officers as may serve to guide aright those seeking settlements on the public lands; and thus prevent settlements and expenditures connected with them which would afterwards prove useless. Nor is there anything inconsistent with this view of the sixth section as to the general route in the clause in the third section making the grant operative only upon such odd sections as have not been reserved, sold, granted, or otherwise appropriated, and to which pre-emption and other rights and claims have not attached, when a map of the definite location has been filed. The third section does not embrace sales and pre-emptions in cases where the sixth section declares that the land shall not be subject to sale or pre-emption. The two sections must be so construed as to give effect to both, if that be practicable."

In *St. Paul and Pacific R'd Co. v. Northern Pacific R'd Co.*, 139 U. S., 1, this court again considered section 6 of the Northern Pacific grant and the effect of an order of with-

drawal on general route made under its provisions. The court said:

"Besides, the withdrawal made by the Secretary of the Interior of lands within the forty-mile limit, on the 13th of August, 1870, preserved the lands for the benefit of the Northern Pacific railroad from the operation of any subsequent grants to other companies not specifically declared to cover the premises. The Northern Pacific act directed that the President should cause the lands to be surveyed forty miles in width on both sides of the entire line of the road, after the general route should be fixed, and as fast as might be required by the construction of the road, and provided that the odd sections of lands granted should not be liable to sale, entry or pre-emption before or after they were surveyed, except by the company. They were therefore excepted by that legislation from grants, independently of the withdrawal by the Secretary of the Interior. His action in formally announcing their withdrawal was only giving publicity to what the law itself declared. The object of the withdrawal was to preserve the land unencumbered until the completion and acceptance of the road. * * * After such withdrawal no interest in the lands granted can be acquired against the rights of the company, except by special legislative declaration, nor, indeed, in the absence of its announcement, after the general route is fixed."

To the same effect is *United States v. Southern Pacific R'd Co.*, 146 U. S., 570.

In *Northern Pacific Railroad Co. v. Amacker*, 175 U. S., 564, this court had before it for construction the act of Congress of April 21, 1876, which validated certain entries theretofore made, and had occasion to consider also the withdrawal on general route under the Northern Pacific grant.

The court said:

"They (the majority of the court) are of the opinion that the effect of the act of 1876 was to validate all otherwise regular pre-emption and homestead entries made prior to the time when the notice of the withdrawal was received at the local land office, although such entries were made after the time the map of general route was filed in the office of the Secretary of the Interior, and the order of withdrawal made; that the withdrawal authorized by the sixth section of the act making the land grant to the Northern Pacific Railway Company, did not vest in the company any title to the lands within the withdrawal limits, but only operated by legislative declaration and subsequent executive action to withdraw those lands from homestead or pre-emption entries."

In Hewitt *v.* Schultz, 180 U. S., 139, this court considered the validity of an executive order withdrawing indemnity lands within the Northern Pacific grant from entry after definite location. The Interior Department had undertaken, as in the case of all other grants, to withdraw indemnity lands, but in 1888 it was held by Secretary Vilas in the case of *Guilford Miller*, 7 *Land Decisions*, 100, that this authority did not exist. This ruling of Secretary Vilas was followed by Secretary Smith in *Northern Pacific Railroad Company v. Davis*, 19 *Land Decisions*, 87, and thereafter remained the settled construction of the Department. This court affirmed the construction placed on the granting act by the Interior Department, and it is important to observe the grounds of the conclusion thus affirmed. The Department held that the granting act did not contemplate a withdrawal of indemnity lands after definite location for two reasons: (*a*) That the withdrawal of

lands in the forty-mile limits on general route, prescribed by section 6, was intended to be exclusive of any other withdrawal, and (*b*) that section 6 in terms forbade a withdrawal of indemnity lands after definite location.

It therefore follows that if the Department was correct in its first reason assigned for the conclusion thus affirmed by this court the validity of the withdrawal on general route must be conceded.

As before stated, the action of the Interior Department in rejecting Nelson's application upon the ground that when he made his settlement, in 1881, the land had been for many years withdrawn from entry is in accordance with the construction of the Department placed on this and similar grants. This construction has been unchanged from the beginning.

Northern Pacific R'd Co. *v.* Presser, 2 Land Decisions, 551.

Northern Pacific R'd Co. *v.* Guilford Miller, 7 Land Decisions, 100.

McClure *v.* Northern Pacific R'd Co., 9 Land Decisions 155.

Northern Pacific R'd Co. *v.* Collins, 14 Land Decisions, 484.

Central Pacific R'd Co. *v.* Beck, 19 Land Decisions, 100.

Northern Pacific R'd Co., 27 Land Decisions, 505.

Southern Pacific R'd Co., 30 Land Decisions, 247.

The plain reading of section 6 of the Northern Pacific granting act cannot leave room for construction, and neither authority nor precedent is required as a basis for the con-

clusion that after the general route was fixed the lands in the forty-mile limits were set apart to aid in the construction of the road, the title to pass when the line should be definitely located. If this was not the purpose of section 6 its enactment was an idle thing, and the location of the general route before the filing of the map of definite location involved a useless expenditure of time and money.

If the filing of the map of general route and the issuing of the order of withdrawal by the Commissioner of the General Land Office was contemplated by the granting act, the Interior Department and the court below were manifestly right in holding that Nelson acquired no right by virtue of his occupancy and that the patent was rightfully issued to the railroad company. The decisions of this court are uniform that no rights can be acquired under the public land laws to lands withdrawn.

Wolsey v. Chapman, 101 U. S., 755.

Wood v. Beach, 156 U. S., 548.

Northern Pacific R'd Co. v. Musser-Sauntry Land, etc., Co., 168 U. S., 604.

The argument urged on the court below in answer to what has been said was based on the decision of this court in *Northern Pacific R'd Co. v. Sanders*, 166 U. S., 620. It was insisted that in that case this court denied that the withdrawal on general route was effectual for any purpose. It seems clear, however, that the contention is based on a misapprehension. In the Sanders case it appeared that the Northern Pacific Company filed its map of general route in 1872 and its map of definite location in 1882, and that between those dates certain persons had made

application to purchase the land in controversy as mineral land, under the laws of the United States. When the Northern Pacific granting act was passed on July 2, 1864, there was no statute in force under which a mineral claim could be initiated, but in 1866 Congress passed an act declaring the mineral lands open to exploration and occupation by citizens of the United States. This court held that the applications to enter the lands as mineral lands were properly received, notwithstanding the withdrawal from pre-emption and homestead entry, and that no inquiry could be allowed as to the mineral or non-mineral character of the lands against which such claims were of record, and that, since they existed at definite location, the lands were excepted from the grant. The court said, on pages 634–'5:

"Until such definite location it was competent for Congress to dispose of public lands on the general route of the road as it saw proper."

In *Menotti v. Dillon*, 167 U. S., 708, a tract of land was in controversy that had been withdrawn on general route under the grant for the benefit of the Central Pacific Railroad Company. After the general route had been fixed and the land withdrawn, the State of California, by its agent, selected the tract in lieu of land excepted from the grant to the State for school purposes. July 23, 1866, before definite location of the line of railroad, Congress passed an act confirming this selection. The court quoted from its opinion in the Sanders case and then said:

"It is true, as said in many cases, that the object of an executive order withdrawing from pre-emption, private entry and sale lands within the general route of a railroad is to

preserve the lands unencumbered until the completion and acceptance of the road. But where the grant was, as here, of odd-numbered sections, within certain exterior lines 'not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed,' the filing of a map of general route and the issuing of a withdrawal order did not prevent the United States *by legislation*, at any time prior to the definite location of the road from selling, reserving, or otherwise disposing of any of the lands which, but for such legislation, would have become, in virtue of such definite location, the property of the railroad company."

It seems clear that the court did not intend by its decisions in the two cases last cited to overrule its previous long line of decisions and change the settled construction of the Interior Department, but intended merely to hold that, until definite location, lands within the withdrawal limits of a railroad grant are still within the disposing power of Congress.

The court will not overrule the construction placed upon acts of Congress by the executive officers of the Government charged with their administration, except for cogent reasons or unless that construction is manifestly erroneous.

United States v. Johnston, 124 U. S., 236.

United States v. Alabama Great Southern Railroad, 142 U. S., 615, 621.

Hewitt v. Schultz, 180 U. S., 139.

But in any event the plaintiffs in error have not shown that any such claim had attached to the land at the date of definite location as would be sufficient to except it from the

grant, even if it should be held that the withdrawal on general route was ineffectual to reserve the land from homestead entry. The record fails to show under what circumstances or for what purpose Henry Nelson settled on the land. The record contains the bare statement that he has occupied the tract since 1881. This court has held in *Northern Pacific R'd Co. v. Colburn*, 175 U. S., 564, and *Tarpey v. Madsen*, 178 U. S., 215, that mere occupancy at the date of definite location is insufficient to except land from a railroad grant.

It is also urged by the plaintiffs in error, for the first time in this court, that the act of July 1, 1898 (30 Stat., 620), confirms the claim of Henry Nelson and renders voidable the patent issued to the Northern Pacific Railroad Company. An examination of the act of 1898 shows that it was enacted for the sole purpose of settling controversies between the railroad company and settlers within its grant where the claim of the railroad company was based, in the words of the act, "on definite location or selection" and the claim of the settler was based upon settlement or purchase from the United States. It was provided that controversies of this nature were to be settled in the Interior Department in the manner provided in the act—by a relinquishment of such claim by one party or the other. It was manifestly not contemplated that where a contest had been terminated and a patent issued to the railroad company the title so confirmed should be clouded, and the land rendered unsalable, by extending to such lands the operation of the act.

There is submitted herewith the circular of instructions issued by the Interior Department under the act of 1898, and immediately following its passage, from which it is

clear that no such construction as that urged by plaintiffs in error is recognized.

It is also suggested by plaintiffs in error that the Northern Pacific *Railway* Company is not entitled to maintain this action as the successor of the Northern Pacific Railroad Company. The successorship, so far as this land is concerned, is conceded in the record (Trans., p. 19). The instructions issued under the act of 1898, *supra*, show further that this successorship is recognized by the United States.

It is submitted that the judgment of the supreme court of Washington should be affirmed.

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James B. Kerr,
Counsel for Defendant in Error.